Supreme Court, U.S.
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No. 03-733

In the
Supreme Court of the United States

ENCINITAS COUNTRY DAY SCHOOL, INC., a California corporation, dba ENCINITAS COUNTRY DAY SCHOOL; KATHLEEN PORTERFIELD, an individual; and M&M DEVELOPMENT COMPANY, a limited liability corporation,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Fourth District Court of Appeal for the State of California

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court below incorrectly apply the standard that a taking occurs when a regulation fails to "substantially advance a legitimate state interest" by concluding (a) that a claimant must first show that the challenged restrictions prevented all economically viable use of property and (b) that the claimant must also show that an unlawful regulation was imposed solely for the purpose of delaying use of the property?

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INTRODUCTION

This case is ripe for review and presents this Court with an opportunity to resolve an important and recurring question of law: under what circumstances does unlawful government action fail to substantially advance a legitimate state interest? The courts below concluded that the California Coastal Commission's (Commission or Coastal Commission) final order denying Encinitas Country Day School, Inc. (School), the use of its property was illegal and that the project could proceed as permitted, but denied the School's takings claim for the loss of all use of its property during the years of litigation required to overturn the Commission's unlawful action. Instead of requiring the School to prove only whether the Commission's unlawful actions failed to substantially advance a legitimate state interest, the California court of appeal also required the School to prove loss of all economically viable use and that the Commission acted unlawfully solely for the purpose of delaying the project.

In its decision below, the California Court of Appeal for the Fourth Appellate District continued a line of cases that has created impassable roadblocks for regulatory takings litigants and foisted the burdens of unlawful government actions onto individual property owners. By grafting these exceptional standards onto the substantial advancement test, the decision below conflicts with the decisions of this Court and highlights several conflicts among the lower courts.

I

THE SCHOOL'S TAKINGS CLAIM IS RIPE

Respondent first argues that the takings claim is not ripe because the School "always had an economically viable development alternative" in that it could have applied for a single family home on the property. *See* Opposition to Petition for Writ of Certiorari (Opp.) at 8. But a completed agency action presenting an issue fit for judicial review, not the

absence of economically viable use, is the touchstone of the ripeness doctrine. Simply put, deprivation of all economically viable use is a categorical takings test, not a ripeness test. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 303, 333-34 (2002) (cataloging seven independent takings tests including loss of all economically viable use and failure to "substantially advance a legitimate state interest"). Thus, even though the court below spoke in terms of ripeness, it decided the merits of the School's takings claim.

Respondent also contends that the School's takings claim is not ripe because the Commission never made a final determination regarding what uses were permitted on the property.[1] *See* Opp. at 8. In denying the School's project, however, the Coastal Commission made a final, unappealable decision on a locally approved project. The court below found that the Commission lacked jurisdiction to review the project and reinstated the permit granted by the City of Encinitas, *see* Petitioners' Appendix (Pet. App.) at C-3, but denied the takings claim. *See* Pet. App. at D-6. This case is therefore ripe because there is quite simply nothing left for the Commission to do in

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[1] Respondent argues at length that the case cannot ripen without a final determination of the uses of this property. A case is ripe as soon as there is a final administrative decision; here, the denial of the School's permit. Even if Respondent were correct that the permissible uses of the property must be determined in order for a case to ripen, this case is still ripe. There is no dispute over the permissible use of the property as the court below reinstated the permit granted by the City of Encinitas. The use permitted on the property is now clear: it is the development that the School applied for and the City approved. Indeed, the School requires nothing more of the Coastal Commission in this case and is in the process of building the same project that the Commission denied. *See* Petitioners' Appendix at C-3.

this case. In fact, there was nothing the Commission was authorized to do in the first place. No matter how long the courts may wait, the Commission will never issue another decision determining what uses are permitted on the School's property, and the California courts will not grant compensation. "Nothing would be gained by postponing a decision . . . ." *See Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 582 (1985). The dispute before this Court is a question of law: whether the School must prove only that those unlawful government actions failed to substantially advance a legitimate state interest or whether it must show loss of all economically viable use and that the government acted in bad faith, intending only to delay the project. Thus, this case presents this Court with a purely legal question and is therefore ripe for review.

II

THE DECISION BELOW RAISES AN IMPORTANT AND RECURRING QUESTION OF TAKINGS LAW

Respondent also argues that the unpublished opinion below raises an unique scenario unlikely to reappear.[2] While it is true that the Coastal Commission is unlikely to illegally assert jurisdiction by declaring Manchester Avenue as the first public road from the sea—the act that the trial court found to be illegal in this case—the *issues* presented by this case are important, and frequently emerge from the lower courts.

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[2] It bears mentioning at this point that Respondent's argument that the decision below was unpublished is irrelevant. A lower court may not avoid review of its unconstitutional decisions by failing to publish them in an official reporter. Further, the decision is widely available through electronic legal research. *See, e.g.*, http://caselaw.lp.findlaw.com/data2/californiastatecases/d038323.pdf (last visited Jan. 27, 2004). Finally, this Court has granted certiorari in a number of unpublished cases. *See, e.g., Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct 2041, *cert. granted*, 537 U.S. 1099 (2003).

Specifically, several lower courts have examined whether a litigant asserting a takings claim must prove both prongs of the *Agins* test: no substantial advancement and loss of all economically viable use. Further, the lower courts disagree over whether a government action may substantially advance a legitimate state interest when that action is unlawful. Finally, the decision below raises important questions over the role of bad faith in a takings claim. While the court below held that bad faith is a *required* element of a substantial advancement claim, other courts have held that bad faith is an altogether independent takings test. Thus, despite Respondent's contentions that the facts of this case are unique, it raises several important *issues* on which there are significant and direct conflicts among the lower courts.

A. The Lower Courts Conflict over Whether the Two Prongs in *Agins* Are Independent Takings Tests

Though Respondent argues that the court below conducted separate analyses of each prong of *Agins*, the opinion is clear that a finding of deprivation of all economically viable use is a "threshold requirement" for a substantial advancement claim. *See* Pet. App. at A-23. Though this Court has repeatedly identified substantial advancement and deprivation of economically viable use as independent *substantive* takings tests, *see, e.g.*, *Tahoe-Sierra*, 535 U.S. at 333, the court below ruled that both tests must be met to establish a takings claim.

That this is an important question is made clear by the conflict among the state courts. *Compare Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54, 56-57 (Fla. 1994), and *Torromeo v. Town of Fremont*, 813 A.2d 389 (N.H. 2002), *cert. denied*, 123 S. Ct. 2283 (2003) (each requiring economically viable use despite finding that the government actions at issue were unlawful), *with Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971, 974 (N.Y. 1999), and *State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002) (each recognizing that

either prong of the *Agins* tests is sufficient to support a takings claim). The lower courts are thus in direct and irreconcilable conflict on this issue and only this Court can resolve this question.

B. The Decision Below Highlights a Conflict Among the Lower Courts over Whether Unlawful Government Action May Substantially Advance a Legitimate State Interest

Respondent also argues that the Coastal Commission's action in this case substantially advances a legitimate state interest despite the fact that the courts below found the action to be unlawful and struck it down. Instead of engaging in the "heightened scrutiny" of legislative ends and means as required by the substantial advancement test, *see, e.g.*, *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1034 (9th Cir. 2000), the lower court denied compensation because the Commission's assertion of jurisdiction was not "a completely untenable legal position." Pet. App. at A-24. Significantly, the School's takings claim was denied even though the trial court found it "hard to think of a more unreasonable or arbitrary position" than that asserted by the Coastal Commission. *See id.* at D-5.

This continues a line of California cases forcing property owners to prove more than that the government action failed to substantially advance a legitimate state interest. The California courts have consistently held that lawsuits over the legitimacy of government action are "normal delays" in the development process—even if those actions are later found to be illegal—unless the landowner shows that the action was so " 'so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development.' " Pet. App. at A-19 (quoting *Landgate v. California Coastal Comm'n*, 953 P.2d 1188, 1199 (Cal.), *cert. denied*, 525 U.S. 876 (1998)). By finding that unlawful government action does not cause a taking if "some rational attorney could believe that the arguments being pursued had

merit," the California courts turn substantial advancement's heightened, ends-means scrutiny into a watered down version of rational basis. *See* Pet. App. at D-3. *See also Loewenstein v. City of Lafayette*, 127 Cal. Rptr. 2d 79 (Ct. App. 2002), *cert. denied*, 124 S. Ct. 67 (2003). California courts have thus grafted a "bad faith" element onto the substantial advancement test, forcing individual property owners to pay for the government's failure to adhere to the law.

Given the radical position the California courts have taken on this issue, it is no surprise that other courts have expressly rejected the rationale offered by the court below. Most notably, the Wisconsin Supreme Court has rejected the *Landgate* rationale by name because it has been "rejected by the United States Supreme Court." *Eberle v. Dane County Board of Adjustment*, 595 N.W.2d 730, 742 n.25 (Wis. 1999). The lower federal courts also reject government intent as a factor and, instead, focus on the effect of the action. *See, e.g., Allenfield Associates v. United States*, 40 Fed. Cl. 471, 487 (1998).

There is also significant conflict among the lower courts over whether an unlawful action may *ever* substantially advance a legitimate state interest. *Compare Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1276 n.10 (Mass. 1992), and *Cannone v. Noey*, 867 P.2d 797 (Alaska 1994) (each concluding that unlawful action may substantially advance a legitimate state interest), *with Eberle v. Dane County Board of Adjustment*, 595 N.W.2d at 742 n.25 (finding that government action restricting the use of property fails to substantially advance a legitimate state interest if it is unlawful or ultra vires). Thus, there is disagreement among the lower courts over the proper level of scrutiny that must be applied in a substantial advancement inquiry. Because it is the only body that can resolve these problems, "th[is] Court needs to openly consider whether treating wrongful acts as takings is consistent with the Fifth Amendment's Takings Clause." Thomas E. Roberts, *An Analysis of* Tahoe-Sierra *and Its Help and Hindrance in*

Understanding the Concept of a Temporary Regulatory Taking, 25 U. Haw. L. Rev. 417, 448 (2003).

CONCLUSION

This case presents this Court with an opportunity to resolve several unclear and important areas of takings law. No future action is required for this Court to bring ultimate resolution to these issues. The issues raised by the decision below are both suitable for this Court's review and important questions of law that require resolution. Given the importance of the questions of law and the substantial conflict among the lower courts highlighted by this decision, this Court should grant the petition for writ of certiorari.

DATED: January, 2004.

Respectfully submitted,

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